

First Proxy Access Nomination Surprises

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The question of whether investors would use proxy access bylaws to make director nominations has been answered.

First came the [Schedule 13D](#) with the announcement that GAMCO Asset Management and its affiliates have notified National Fuel Gas Company (NFG) that it is nominating one director pursuant to the company's proxy access bylaws. The investor owns 7.81% of the company's outstanding shares. This was the ninth amendment to the Schedule 13D since 2010. GAMCO indicated that it believes its nominee's skill sets and relevant experience "will be extremely valuable to the [i]ssuer and GAMCO is confident that its [n]ominee will have an immediate positive impact on the Board." Later in the day, GAMCO filed with the SEC the [Schedule 14N](#) required to make proxy access nominations.

NFG adopted its proxy access bylaw in March of this year, without having a shareholder proposal on the ballot previously. The bylaw has fairly typical provisions, including the ability for one or more shareholders owning 3% or more of the company's shares for at least three years to nominate up to 20% of the board. One unusual aspect is that the deadline for making proxy access nominations aligns with the deadline to make nominations under the advance notice provisions in the bylaws, whereas for most companies the proxy access nominations deadline would be earlier.

GAMCO has publicly pushed NFG to make strategic changes for a few years; and in 2015 it submitted a shareholder proposal asking the company to hire an investment bank to explore a spin-off of its utility segment. GAMCO spoke publicly about urging the company to explore a spinoff and even the possibility of sending NFG a shareholder proposal in early 2014. The company's opposition statement to the proposal stated that "[w]hile we believe the GAMCO Proposal was made with the sincere belief that it would benefit stockholders, after careful consideration, we firmly believe that our current strategy best positions us to deliver long-term value to investors." The proposal received only about 18% favorable support, with GAMCO owning 9% at that time.

NFG was the subject of a proxy contest in 2007, which it settled by giving New Mountain Ventures a board seat and splitting the CEO and chairman positions.

This nomination is not what many had expected to see resulting from the wide adoption of proxy access, now at a record high, having being endorsed by over 300 companies. GAMCO is fairly active in seeking board representation, with 42 campaigns in the past six years according to one source. Activist hedge funds were not believed to be interested in proxy access due to the three-year holding requirement and the restrictions in the bylaws, including limitations on solicitation. However, using proxy access may have been appealing as an efficient and inexpensive way to agitate for a single board seat.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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